In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1566

GRANNY GOOSE FOODS, INC., a corporation, SUNSHINE BISCUITS, INC., a corporation, and STANDARD BRANDS, INC., a corporation,
Petitioners

vs.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70 OF ALAMEDA COUNTY, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

WESLEY J. FASTIFF,
GEORGE J. TICHY, II,
NANCY L. OBER,
LITTLER, MENDELSON & FASTIFF,
593 Market Street,
San Francisco, California 94105,
Telephone: (415) 433-1940,
Attorneys for Petitioners.

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Petitioners, Granny Goose Foods, Inc., Sunshine Biscuits, Inc., and Standard Brands, Inc., respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for

the Ninth Circuit reversing an order of contempt entered by the United States District Court for the Northern District of California against Respondent, Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 472 F.2d 764 and appears at Appendix A, *infra*, pp. i-xi. The Order and Judgment of Criminal Contempt of the District Court is unreported and appears at Appendix C, *infra*, pp. xiv-xxi.

JURISDICTION

The Opinion of the Court of Appeals was filed January 18, 1973. A timely petition for rehearing was denied on February 22, 1973. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1). Federal jurisdiction was invoked herein under 29 U.S.C. §185 by the removal of this case from the Superior Court of the State of California to the United States District Court for the Northern District of California.

QUESTIONS PRESENTED

1. Where a conflict exists between state law and the federal removal statute concerning the effective period of a state court temporary restraining order, which law should apply in determining the effective period of such restraining order after removal of the underlying action to federal court?

2. Where a conflict exists between the Federal Rules of Civil Procedure and the federal removal statute concerning the effective period of a state court order issued prior to removal, which law or rule should apply in determining the effective period of a restraining order after removal of the underlying action to federal court?

3. Does the denial by the district court, after hearing, of a motion to dissolve a removed temporary restraining order constitute the issuance of a preliminary injunction within the meaning of the Federal Rules of Civil Procedure for purposes of enforcement by contempt judgment?

STATUTORY PROVISIONS INVOLVED

This case involves Title 28, Section 1450 of the United States Code, 62 Stat. 940, which provides in relevant part as follows:

> "Whenever any action is removed from a state court to a district court of the United States,
> * * *
>
> * * *
>
> All injunctions, orders, and other proceedings had in such action prior to its removal shall re-

main in full force and effect until dissolved or modified by the district court."

This case also involves both Rule 65(b) of the Federal Rules of Civil Procedure and Section 527 of the California Code of Civil Procedure, the relevant portions of which are set forth in Appendix D hereto.

STATEMENT OF THE CASE

A. The Proceeding in the Superior Court.

On May 15, 1970, Petitioners Granny Goose Foods, Inc., and Sunshine Biscuits, Inc., sought and obtained a Temporary Restraining Order and Order to Show Cause in the Superior Court of the State of California for the County of Alameda against picketing and work stoppages induced by Respondent at said Petitioners' Alameda County facilities. Petitioners contended that Respondent's strike and picketing activities breached the no-strike and grievance provisions of the collective bargaining agreement then in effect between Petitioners and Respondent (R. 6-12, 30-32). An Amended Complaint was filed on May 18, 1970. The Amended Complaint named Standard Brands, Inc., as an additional party plaintiff and added a party defendant but preserved the same allegations and prayer for relief (R. 42-50). On the same day the Superior Court issued a Modified Temporary Restraining Order extending the coverage of the original order to the parties named in the Amended Complaint and a Show Cause Order with a return date of May 26, 1970 (R. 112, 114).

The following day, May 19, 1970, Respondent and individual Union officer and agent defendants filed a Petition for Removal of the case from state to federal court on the ground that the action arose under 29 U.S.C. §185. The Petition was amended on May 20, 1970, to include the Amended Complaint for injunction (R. 40-41). The case was thereupon removed to the United States District Court for the Northern District of California (R. 33).

B. Proceedings in the District Court Immediately Following Removal.

Once the case had been removed to the district court, Respondent and the other named defendants moved to dissolve the Temporary Restraining Order on the alleged ground that Section 4 of the Norris-LaGuardia Act (29 U.S.C. §104) prohibited the federal court from maintaining the order in effect (R. 34-35). Immediately thereafter Petitioners filed a Motion to Remand (R. 66-67, 68).

The Motions to Dissolve and to Remand were heard on May 27, 1970. At the hearing the court denied the Motion to Remand and took the Motion to Dissolve under submission. On June 4, the court issued its order denying the Motion to Dissolve, relying on this Court's landmark decision in *The Boys Market, Inc. v. Retail Clerks' Union,* 398 U.S. 235 (1970) (R. 123). Thereafter, Respondent took no other action to dissolve the Modified Temporary Restraining Order or otherwise seek further hearings to set aside that order.

C. The Contempt Proceeding in the District Court.

On December 1, 1970, Petitioners filed a Motion for Contempt Judgment, alleging that since on or about November 30, 1970, Respondent had, *inter alia*, engaged in picketing and directed work stoppages at Petitioners' Bay Area facilities, in defiance of the Modified Temporary Restraining Order issued by the Superior Court of Alameda County and continued in effect after removal to the district court (R. 194-198).

The hearing on Petitioners' Motion for Contempt Judgment was held on December 2, 1970. At the conclusion of the hearing the court adjudged Respondent in willful contempt of an Order of the court which remained in full force and effect by reason of the provisions of the federal removal statute, 28 U.S.C. §1450 (Tr. 82, 85).

D. The Decision of the Court of Appeals.

A divided Court of Appeals reversed, two to one, the district court's judgment of contempt and vacated the contempt proceedings. In so doing, the Court majority held that the Modified Temporary Restraining Order issued by the state court could not, even after its removal to federal court, survive beyond June 7, 1970, the date the Court considered to be the injunction's last effective date under California law[1]

[1]It is significant that the Court of Appeals misapplied California law, which does not limit the effectiveness of a temporary restraining order to a mere 20 days under circumstances such as exist herein. In fact, California law is flexible on this point: A temporary restraining order does not necessarily expire after 15 or 20 days. Section 527 of the California Code of Civil Procedure (see Appendix D, *infra*) expressly permits the continuance of a tem-

and/or Rule 65(b) of the Federal Rules of Civil Procedure. The majority opinion disregarded the plain and unqualified language of Section 1450. As the dissent pointed out, the majority also failed to consider the decisions of other Circuits unanimously holding that unless the federal court dissolves the state court temporary restraining order, that order remains in effect in federal court regardless of state law, and regardless of any time limitations imposed by Rule 65(b) of the Federal Rules of Civil Procedure. *Appalachian Volunteers, Inc. v. Clark,* 432 F.2d 530 (6th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971); *General Elec. Co. v. Local Union 191,* 413 F.2d 964, 966 (5th Cir. 1969), *vacated and remanded on other grounds,* 398 U.S. 436 (1970); *Morning Telegraph v. Powers,* 450 F.2d 97 (2d Cir. 1971), *cert. denied,* 405 U.S. 954 (1972).

REASONS FOR GRANTING THE WRIT

This case presents an important issue of first impression dealing with clear conflicts between the Federal removal statute and the Federal Rules of Civil Procedure. More specifically, a substantial question is presented with regard to the effect of Section 1450

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porary restraining order for "a reasonable period" beyond 15 or 20 days as a matter of course to allow the defendant to meet the application for a preliminary injunction. The restraining order may likewise be continued in effect beyond such period by stipulation of the parties, or "when the necessary business of the court prevents it from hearing the matter within that time." *McDonald v. Superior Court,* 18 Cal.App.2d 652, 657 (1937). Thus, state policy is *not* to impose an automatic termination date on restraining orders in every case.

on the duration of state court orders in cases removed to federal court when such section conflicts with state law and the Federal Rules of Civil Procedure. This question affects the fair and uniform administration of the federal courts. It also involves a conflict of decisions and analyses among Circuit Courts of Appeals and in the Ninth Circuit itself. Until this issue is resolved, litigants in the Ninth Circuit will be subject to a more stringent rule regarding the duration of removed orders than litigants in other Circuits. Moreover, both litigants and the federal courts will remain uncertain as to the proper construction of Section 1450, Title 28, United States Code.

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1. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH SECTION 1450 OF TITLE 28 OF THE UNITED STATES CODE.

The language of Section 1450 is plain and unqualified: *All state court orders are to remain in full force and effect in federal court after removal. Only if the federal court dissolves or modifies such a removed order does it cease to be effective.*

The majority opinion in the Court of Appeals disregards the plain and unqualified language of Section 1450. The majority decided that Section 1450 serves merely to "prevent a break" in the effectiveness of an existing state order upon its removal to federal court, so that such order does not expire before the date when it would otherwise have expired in state court.[2]

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[2]The Ninth Circuit majority offers no authority for its novel interpretation of Section 1450.

According to the analysis of the majority, a removed order continues to be subject to state law and policy. Therefore, the duration of a removed order in federal court is no greater than it is under state law. Furthermore, according to the majority opinion, the duration of the removed order is subject to the time limits set by Rule 65(b)[3] of the Federal Rules of Civil Procedure.

Nowhere does the removal statute itself support such a construction of the law. Section 1450 makes no reference to state law or policy. Nor does it refer to any other federal law. Rather, it provides that a removed order shall expire only in the event that the federal court dissolves it. Had Congress intended to defer to state policy regarding the duration of orders or to Rule 65(b) of the Federal Rules of Civil Procedure, it would have been a simple matter to draft Section 1450 to accomplish that purpose. Instead, however, *the statute prescribes in absolute terms, without reference to extrinsic law or policy, the duration of all orders removed to federal court.*

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2. THERE IS A CLEAR CONFLICT AMONG THE CIRCUITS REGARDING THE EFFECT OF TITLE 28, SECTION 1450, UNITED STATES CODE, ON THE DURATION OF REMOVED ORDERS.

Several recent decisions in other Circuits consider the effect of Section 1450 on temporary restraining orders in cases removed to federal court. All of these

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[3]See Appendix D hereto.

decisions in other Circuits interpret Section 1450 differently from the Ninth Circuit. In each case the other circuits have determined that Section 1450 precludes the automatic termination of a removed order. Thus, in *Appalachian Volunteers, Inc. v. Clark, supra,* the Sixth Circuit rejected the contention that a temporary restraining order granted by a state court in a case subsequently removed to federal court expired no later than ten days after the removal petition was filed, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure. Quoting Section 1450, the Court held that (*Appalachian Volunteers, Inc. v. Clark, supra,* 432 F.2d at 533):

> "This clear statutory command must take precedence over the arguably contrary rule of procedure, and it would seem to *preclude the automatic termination* of the temporary restraining order obtained in the state court." [Emphasis added.]

In an earlier case the same Circuit ruled that by reason of Section 1450 affirmative action by the federal court in the form of a dissolution order is required to render a state court order ineffective after removal. *Munsey v. Testworth Laboratories,* 227 F.2d 902, 903 (6th Cir. 1955).

The Second Circuit reached the same conclusion concerning the effect of Section 1450 in *Morning Telegraph v. Powers, supra.* In that case, the Morning Telegraph had obtained an *ex parte* temporary restraining order against the defendant union in state court. The Second Circuit said in dicta that the "restraint was to continue in effect until a hear-

ing scheduled for March 3, 1971, but was extended automatically by 28 U.S.C. §1450 [footnote omitted] when removed by the Union to the federal district court * * *." *Morning Telegraph v. Powers, supra.* 450 F.2d at 98.

The Fifth Circuit, in *General Elec. Co. v. Local Union 191, supra,* held that the court below properly granted the defendant's motion to dissolve a state court temporary restraining order after removal of the case. Citing Section 1450, the Court said that (*General Elec. Co. v. Local Union 191,* 413 F.2d at 966):

> "We are of the view that the District Court did not err in dissolving the injunction * * * because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal court * * *." 413 F.2d at 966.

Furthermore, federal district courts in other Circuits have consistently held that a removed order does not expire automatically, but continues in effect unless it is dissolved by the federal court. In *Peabody Coal Co. v. Barnes,* 308 F.Supp. 902, 903 (E.D. Mo. 1969), the Court held that:

> "Under Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal *until and unless dissolved by this Court.*" [Emphasis added.]

In that case the Court ruled that Section 1450, not Rule 65(b), applied to the removed order. As a re-

sult, a temporary restraining order issued by a state court remained in effect *two and a half months* after its removal to the district court, until the district court dissolved it.

In *The Herald Co. v. Hopkins,* 325 F. Supp. 1232 (E.D.N.Y. 1971), the defendant union removed the underlying action to federal court after the plaintiff obtained a temporary restraining order against the defendant's strike and work slowdown. Defendant then moved to vacate the state court order. In ruling on the motion, the district court stated in dicta (*The Herald Co., supra,* 325 F.Supp. at 1233):

> "Of course, under 28 U.S.C. §1450, the State restraining order has remained in effect pending consideration of the motions and rendering of this decision."

In all of the above decisions applying and construing Section 1450, the courts concluded that a removed state order *does not* expire automatically on its termination date under state law, nor ten days after its removal under Rule 65(b). ***Without exception, the courts of other Circuits have determined that only dissolution by the federal court terminates such a state court order.***

The majority opinion of two members of the Ninth Circuit panel which decided the appeal in this case makes no mention of the conflicting decisions of other Circuits. Such opinion further fails to attempt to reconcile the majority's reading of Section 1450 with either the plain language of the statute itself or the existing case law on this issue.

There is a clear conflict between the Ninth Circuit and other Circuits as to the effect of Section 1450 on the duration of removed state orders. If the Ninth Circuit's decision is allowed to stand, litigants in that Circuit will lose the benefit of a state court order after removal on the date state law provides, whereas litigants in other Circuits will be able to rely on such a state order indefinitely, so long as the district court does not modify or dissolve it. It is therefore respectfully submitted that *certiorari* should be granted so that this inequity may be prevented and uniform treatment of litigants in removed actions obtained.

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3. THE COURT OF APPEALS' DECISION DEFERRING TO STATE LAW AND POLICY ON THE DURATION OF RESTRAINING ORDERS CONFLICTS WITH AND CONTRAVENES DECISIONS OF THIS COURT HOLDING THAT FEDERAL LAW GOVERNS QUESTIONS OF PROCEDURE IN THE FEDERAL COURTS.

The majority opinion's deference to state law and policy regarding the duration of restraining orders not only contravenes the language of Section 1450 and existing authorities construing that statute but also ignores the established rule that state law has no application to questions of procedure once a case has has been removed to federal court. Such questions are governed by federal law. *Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943); *Hanna v. Plumer*, 380 U.S. 460 (1965).

The duration of a restraining order is a procedural matter governed by federal law, even though the

choice of that law affects the outcome of the case. In *Munsey v. Testworth Laboratories, supra,* the Sixth Circuit held that a default judgment rendered by a state court prior to removal was subject to being set aside by the federal court after removal, just as it would have been in state court before removal. But federal, not state, law determined the time in which the court was required to act to set aside the judgment. Similarly, federal law controls the time in which a motion to set aside a state court order after its removal to federal court must be made. *Butner v. Neustadter,* 324 F.2d 783, 785-786 (9th Cir. 1963).

Thus, the federal courts, adhering to the decisions of this Court, have treated questions of time limitations on court orders and proceedings as procedural, and have looked to federal law to resolve them. In the instant case, the duration of the Modified Temporary Restraining Order after removal to federal court was such a matter of procedure. Federal law thus determined the question of how long that Order remained in effect. Contrary to the opinion of the Court of Appeals majority, state law could have no part in the determination of that question.

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4. THE COURT OF APPEALS IS DIVIDED ON THE PROPER CONSTRUCTION OF SECTION 1450

In the United States Court of Appeals for the Ninth Circuit, itself, there is no uniformity of opinion on the proper construction of Section 1450. The two-member majority in the instant case holds that

Section 1450 is limited by state law and Rule 65(b) of the Federal Rules of Civil Procedure. In a sharp dissent the third member of the panel, Judge Trask, finds the majority's reading of Section 1450 to be at odds with the language of the statute itself (Appendix A, pp. vi-xi), and their deference to state law and policy an unwarranted departure from federal cases holding that federal law governs questions of procedure in federal court. He concludes that the district court's judgment should be affirmed.

This division within the Court of Appeals, which compounds the majority's break with the decisions of other Circuits, constitutes an additional compelling reason for granting *certiorari* to remove all doubt concerning the meaning of Section 1450 and the interrelation between this federal statute, the Federal Rules of Civil Procedure and state law.

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5. CERTIORARI SHOULD BE GRANTED HERE TO RESOLVE AN ISSUE AFFECTING THE ADMINISTRATION OF THE FEDERAL COURTS.

The construction given to Section 1450 determines the duration of removed orders in federal district court, and thus determines, as in this case, whether the district court can recognize and enforce such orders after removal without regard to state law. Further, the construction given to Section 1450 determines whether the plaintiff—beneficiary of the state court order—has the burden of seeking an extension of that order in federal court, or whether the de-

fendant has the burden of persuading the district court to dissolve or modify the order.

This Court, as rule-maker for the federal court system, has both the authority and the special competence to decide these questions of procedure for the federal courts. It is thus particularly important that *certiorari* be granted to review the issues presented herein.

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6. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A DISTRICT COURT'S DENIAL OF A MOTION TO DISSOLVE A REMOVED STATE COURT TEMPORARY RESTRAINING ORDER CONSTITUTES THE GRANTING OF A PRELIMINARY INJUNCTION.

The Court of Appeals majority rejected any contention that the state court temporary restraining order effectively became a preliminary injunction when the district court denied Respondent's motion to dissolve the order.

> "The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate."
>
> (Appendix A, p. vi.)

This conclusion squarely conflicts with the decisions of other Circuits on the same question. In *Morning Telegraph v. Powers, supra,* 450 F.2d at 99, the Second Circuit held that after removal of the case

> "* * * the practical effect of the refusal (of the district court) to dissolve the temporary restrain-

> ing order was the equivalent of a grant of preliminary injunctive relief."

Other Circuits and district courts have reached the same conclusion. *Appalachian Volunteers, Inc. v. Clark, supra. General Elec. Co. v. Local Union 191, supra.* See also, *Peabody Coal Co. v. Barnes, supra.*

Judge Trask's dissent in the instant case, citing these decisions of other Circuits, disagrees with the majority as to the effect of the district court's denial, after hearing, of Respondent's motion to dissolve the Modified Temporary Restraining Order.

> "The motion to dissolve was denied upon that hearing leaving the order of restraint against the Union in full force and effect. At this point the case was in exactly the same posture as it would have been had the order to show cause been heard and the preliminary injunction granted on that order pending a trial on the merits of the permanent relief. The temporary restraining order had been disposed of by hearing and decision. The order continuing the restraint was, in effect, a preliminary injunction pending a hearing on the merits."
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> (Appendix A, p. viii.)

The question of how the denial of a motion to dissolve a restraining order affects the duration of that order is a further ramification of the conflict among the removal statute, the Federal Rules of Civil Procedure and state law. The absence of a uniform rule in this area among the Circuits can only create inequities among litigants. This problem is further com-

plicated in cases involving Section 301 of the National Labor Relations Act, as amended (29 U.S.C. §185), because of this Court's overriding concern with uniform treatment of litigants regardless of forum. *Teamsters, Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This Court, therefore, should determine whether the denial of a motion to dissolve an order is tantamount to the issuance of a preliminary injunction.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WESLEY J. FASTIFF,
GEORGE J. TICHY, II,
NANCY L. OBER,
LITTLER, MENDELSON & FASTIFF,
Attorneys for Petitioners.

May 17, 1973.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 26838

Granny Goose Foods, Inc., a corporation, and Sunshine Biscuits, Inc., a corporation, Standard Brands, Inc., a corporation,
Plaintiffs-Appellees,
vs.
Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,
Defendant-Appellant.

[Filed Jan. 18, 1973]

Appeal From the United States District Court
for the Northern District of California

Before: DUNIWAY, HUFSTEDLER, and TRASK,
Circuit Judges

HUFSTEDLER, Circuit Judge:

The Union appeals from an order holding it in criminal contempt for violating a temporary restrain-

ing order. We reverse because the order expired by operation of law after removal of the cause to the federal court and before the alleged contumacious conduct occurred.

Granny Goose Foods, Inc., and Sunshine Biscuits, Inc. ("Employers"), commenced the action in a California state court by filing a complaint charging the Union with breach of a collective bargaining agreement. It simultaneously filed an application for a temporary restraining order. On May 15, 1970, the state court, *ex parte,* issued a temporary restraining order and an order to show cause why a preliminary injunction should not be granted, made returnable on May 26, 1970. On May 18, 1970, Employers filed an amended complaint virtually identical to the original complaint except for the addition of new parties. On the same date the state court, *ex parte,* issued a modified temporary restraining order reflecting the change in parties and likewise modified the order to show cause, returnable May 26, 1970.

On May 19, 1970, the Union filed a petition to remove the action to the federal court. The following day it filed an amended petition to remove naming the new parties. Immediately after removal, the Union filed a motion to dissolve the temporary restraining order, noticed for May 22, 1970, a date within the life of the state order. Employers simultaneously filed a motion to remand, also noticed for May 22, 1970. Because the case was transferred from one federal judge to another, the motions were not heard until May 27, 1970. The district judge denied

the motion to remand on May 27, and it submitted the motion to dissolve.

While the motion to dissolve was pending, the Supreme Court decided *Boys Market, Inc. v. Retail Clerks Union* (1970) 398 U.S. 235, a decision that destroyed the foundations of *Sinclair Refining Co. v. Atkinson* (1962) 370 U.S. 195, on which the Union's dissolution motion had been based. On June 4, 1970, the district court denied the motion to dissolve. There was no further action until the proceedings to obtain a contempt order were brought on December 1, 1970, charging the Union with violating the modified temporary restraining order by commencing strike and picketing activities against Employers on November 30, 1970. Employers never applied to the district court for a preliminary injunction. Contempt proceedings, begun on December 2, 1970, concluded with an adjudication of criminal contempt in which a substantial fine was imposed on the Union. This appeal followed.

If the action had been retained by the state court, the temporary restraining order would have expired by operation of law not later than 20 days after issuance of the modified order, *i.e.*, June 7, 1970 (Cal. Code Civ. Proc. § 527[1]). If the restraining order had

[1]Section 527 provides:

"An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. . . .

"No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless

been initially granted by the federal district court, it would have expired not later than June 7, 1970, under the provisions of Rule 65(b) of the Federal Rules of Civil Procedure.[2]

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it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. . . ."

We recognize that, under state law, the temporary restraining order would have expired on the specified return date, May 26, 1970. (*E.g.*, Sharpe v. Brotzman (1956) 145 Cal. App. 2d 354.) But we assume that the Union would have moved the state court to dissolve, as it did in the federal court, and that there would possibly have been continuances of the return date within the 20-day maximum permitted by statute.

[2]Rule 65(b) provides:

"A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to

Employers contend that the life of the temporary restraining order was indefinitely prolonged by the provisions of 28 U.S.C. § 1450: "All injunctions, orders, and other proceedings had in such [removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The temporary restraining order was neither dissolved nor modified by the district court; therefore, it says, the order remained in full force and effect.

Section 1450 does not create a special breed of temporary restraining orders that survive beyond the life

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give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

For the purpose of this discussion we assume, *arguendo*, but we do not decide that Union's motion to dissolve was a consent to hold the matter in status quo until the motion could be decided and that it was, to that extent, a consent to an extension of the order within the exception to Rule 65(b).

span imposed by the state law from which they spring and beyond the life that the district court could have granted them had the orders initiated from the federal court. Section 1450 permits transfer to the federal court of state court restraining orders without any loss of potency during the trip. It adds nothing to the terms of state orders. The purpose of section 1450 is to prevent a break in the force of an injunction or a restraining order that could otherwise occur when jurisdiction is being shifted. Employers' construction of section 1450 would offend the policy of California and federal policy imposing strict limitations on the longevity of temporary restraining orders. The temporary restraining order could not survive beyond June 7, 1970, the last day within its maximum state life, a date months before the alleged contumacious acts transpired.

If Employers wanted a preliminary injunction, they easily could have sought one. They did not do so. The Union's unsuccessful effort to dissolve the order before it died a natural death did not convert the temporary restraining order into a preliminary injunction or estop it from relying on the death certificate.

The order is REVERSED and the contempt proceedings are vacated.

TRASK, Circuit Judge, dissenting:

The issue upon which this court is called to rule, is the effect of 28 U.S.C. § 1450 on the duration of a

temporary restraining order issued by a state court in a case which is then removed to the federal court.

Had the case not been removed, the California Code of Civil Procedure would have caused such a temporary restraining order issued *ex parte* to be extinguished in a maximum of 20 days; had the same order been issued originally in the federal court, it would have ceased to exist in the same period of time.

When such a case, with an outstanding restraining order issued and pending, is removed, it becomes subject to 28 U.S.C. § 1450 which provides in pertinent part:

> "All injunctions, orders, and other proceedings had in [a removed] action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

The majority of the court is of the opinion that the purpose of this section is to "prevent a break" in the continuity of a restraining order that "could otherwise occur" during the change from state to federal court. It would seem that if such were the purpose, the statute could have very simply said so. Or, the Congress could have provided that the restraint should not in any event continue in effect for a greater period of time than that provided by the state statute or the state court's order. It did not. It provided very simply, but very clearly, that all injunctions should remain in full force and effect "until dissolved or modified by the district court." It thus requires affirmative action on the part of one of the parties before it may be dissolved or modified.

And if the district court refuses to dissolve it, the temporary restraining order issued *ex parte* remains in force until the case is tried on its merits and the temporary injunction or permanent injunction is granted or denied.

In this case the pleadings disclose that the employers, as plaintiffs, filed a complaint and then an amended complaint seeking relief against the defendant Union's alleged unlawful interference with its activities. The complaint sought a permanent injunction. It also asked for a temporary restraining order pending a hearing on an order to show cause and that a preliminary injunction be granted upon the hearing of the order to show cause to continue during the pendency of the action. The action was removed to federal court before the return date of the order to show cause in the state court. But the Union promptly filed a motion in federal court to dissolve the temporary restraining order and caused the motion to be brought to a hearing. The motion to dissolve was denied upon that hearing leaving the order of restraint against the Union in full force and effect. At this point the case was in exactly the same posture as it would have been had the order to show cause been heard and the preliminary injunction granted on that order pending a trial on the merits of the permanent relief. The temporary restraining order had been disposed of by hearing and decision. The order continuing the restraint was, in effect, a preliminary injunction pending a hearing on the merits. *Morning Telegraph v. Powers,* 450 F.2d 97, 99 (2nd Cir. 1971), *cert. denied,* 405 U.S. 954 (1972); *Appalachian Vol-*

unteers, Inc. v. Clark, 432 F.2d 530, 533 (6th Cir. 1970), *cert. denied,* 401 U.S. 939 (1971). *Morning Telegraph, supra,* points out that in applying the distinction between a temporary restraining order and a preliminary injunction,

> "'. . . the label put on the order by the trial court is not decisive.' Wright, Federal Courts 459 (2d ed. 1970), quoted with approval in Belnap v. Leary, 427 F.2d 496, 498 (2d Cir. 1970). Here, the practical effect of the refusal to dissolve the temporary restraining order was the equivalent of a grant of preliminary injunctive relief. Peabody Coal Co. v. Barnes, 308 F.Supp. 902 (E.D. Mo. 1969)." 450 F.2d at 99.

In *Peabody Coal Co. v. Barnes, supra,* the district court said, "[u]nder Section 1450, 28 U.S.C., the temporary restraining order issued by the state court remains in full force and effect after the removal until and unless dissolved by this Court." 308 F.Supp. at 903. In that case the temporary restraining order issued without notice remained in effect some two and one-half months without a request for a hearing.

Indeed, the California courts appear to follow the same reasoning. In *Gray v. Bybee,* 60 Cal. App. 2d 564, 141 P.2d 32, 35 (1943), the court said:

> "The granting or denial of a temporary restraining order is discretionary with the trial judge (14 Cal.Jur. 180, sec. 7) and amounts to a mere preliminary or interlocutory order to keep the subject of litigation in status quo pending the determination of the action on its merits. People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361, 362; 14 Cal.Jur. 180, sec. 9."

It is asserted here that if the employers had wanted a preliminary injunction they could easily have sought one. They did seek one in their pleadings. After the trial court denied the motion to dissolve there was no reason for the employers to take the initiative. The restraint they sought had been obtained. Had the Union desired to litigate the merits of the trial court's refusal to dissolve the temporary restraining order, the Union could easily have done so, either by an appeal from the trial court's order, treating it as the grant of a preliminary injunction, *see Morning Telegraph v. Powers, supra,* or by bringing the case on for trial on the merits. It did neither.

The argument that to construe Section 1450 according to its plain language would somehow offend the policy of California and, therefore, the California time limitation should control, is difficult to follow. It is well established that once a case is removed from state court to federal court, questions of procedure are governed by federal law and not state law. For instance, the time in which to file an amended complaint is governed by federal law and not state law.

Mr. Justice Douglas said in *Freeman v. Bee Machine Co.,* 319 U.S. 448, 452 (1943):

> "The jurisdiction exercised on removal is original not appellate. *Virginia v. Rives,* 100 U.S. 313, 320. The forms and modes or proceeding are governed by federal law. *Thompson v. Railroad Companies,* 6 Wall. 134; *Hurt v. Hollingsworth,* 100 U.S. 100; *West v. Smith,* 101 U.S. 263; *King v. Worthington,* 104 U.S. 44; *Ex parte Fisk,* 113 U.S. 713; *Northern Pacific R. Co. v. Paine,* 119

U.S. 561; *Twist v. Prairie Oil & Gas Co.*, 274 U.S. 684; *Rorick v. Devon Syndicate*, 307 U.S. 299."

Similarly, where a conflict exists between state rule and federal rule as to service of process in a diversity jurisdiction case, the federal rule applies. *Hanna v. Plumer*, 390 U.S. 460 (1965). *See also, Seal v. Industrial Electric, Inc.*, 362 F.2d 788 (5th Cir. 1966). A federal court was not limited by a state 30-day rule to set aside a default judgment. *Munsey v. Testworth Laboratories, Inc.*, 227 F.2d 902, 903 (6th Cir. 1955).

So, in this case I would hold that Section 1450 protects the restraining order during its removal trip and preserves it as it reaches its destination in the federal court. At that point federal procedural and statutory rules take control. Rule 65(b) Fed. R. Civ. P. would prevail over the state rule as to termination, and the "clear statutory command [of Section 1450] must take precedence over the arguably contrary rule of procedure [of Rule 65(b)]." *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970).

I would therefore conclude that the temporary restraining order continued in existence as a preliminary injunction after hearing by the district court and its denial of the motion to dissolve the restraint. The order of contempt was not clearly erroneous and the judgment of the trial court should be affirmed.

/s/ Ozell M. Trask
United States Circuit Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 26838

Granny Goose Foods, Inc., a corporation, Sunshine Biscuits, Inc., a corporation, Standard Brands, Inc., a corporation,
Plaintiffs-Appellees,

vs.

Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,
Defendant-Appellant.

[Filed Feb. 22, 1973]

ORDER

Before: DUNIWAY, HUFSTEDLER, and TRASK, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

In the United States District Court
Northern District of California

Before: HON. ALFONSO J. ZIRPOLI, JUDGE

No. C 70 1057

Granny Goose Foods, Inc., et al.,
Plaintiffs,

vs.

Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, et al.,
Defendants.

[Filed Dec. 2, 1970]

Appearances:

For Plaintiffs:
George J. Tichy, II, Esq.
Wesley J. Fastiff, Esq.
J. Richard Thesing, Esq.

For Defendants:
Duane B. Beeson, Esq.
Kenneth N. Silbert, Esq.

REPORTERS' TRANSCRIPT

December 2, 1970

Wednesday

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER AND JUDGMENT OF CRIMINAL CONTEMPT

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. ATTEST:

E. C. Evensen,
Clerk, U.S. District Court
Northern District of California
/s/ By Edward C. Evensen
Deputy Clerk
Dated Dec. 2, 1970

December 2, 1970—Wednesday

[Reporter's partial transcript.]

* * * *

The Court: All right, then, considering the nature of the case, the urgency involved, the case is submitted and I am going to make a ruling now.

To be specific and dispel any suspense, it's obvious to me that the Defendant Union is in contempt of the order of the Court, and that I must accordingly enter judgment based upon that contempt.

This case had its origin in an action filed in the Superior Court of the State of California in and for the County of Alameda, in which the plaintiffs sought to restrain certain picketing and work stoppage activities of the defendants. The Honorable Lewis E. Ler-

cara of said Superior Court, on May 18, 1970, entered a modified temporary restraining order against the defendants which enjoins the defendants, Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Robert Laird, James Muniz, Joseph Areno, Louis Riga, Charles Mack, Lawrence Diaz, Edward Painter, Alex Ybarraloza, Leroy Nunes, Stanley Botello, Ronald Rocha, Art Soto, Jack Sweeny, Richard S. Durasette, Robert Windsor, Al Leishman and Richard Saramento, and each of them, and their officers, agents, representatives, employees and members, and each and every and all other persons acting at the direction of or in concert with said defendants, enjoining them from:

a. Directing or ordering or otherwise inducing, the employees of the plaintiffs not to perform work for any of said companies;

b. Picketing at any facility or situs of equipment of the plaintiffs where the effect of such picketing is to induce, encourage or cause company employees not to work for plaintiffs;

c. Engaging in any activity for the purpose of causing or with the effect of causing, a stoppage of work for, or strike against plaintiffs;

d. Failing to withdraw any orders or directions to employees of plaintiffs that said employees should engage in a cessation of work for such companies.

A copy of that modified temporary restraining order was duly and timely served upon the Defendant

Union, as appears from the affidavit on file in these proceedings and the stipulation arising in connection with the testimony of Mr. Farrell.

Thereafter, on May 18, 1970, the defendants petitioned to remove the said cause to this Court under the provisions of Section 1441 of Title 18, U.S. Code, on a claim that this Court has original jurisdiction under Section 301 of the National Labor Relations Act as amended, 29 U.S.C. Section 185, and at the same time moved to dissolve the injunction of the State Court on the ground that an injunction issued by a State Court against striking and picketing activities by a labor organization and its agents must be dissolved for lack of jurisdiction by a Federal Court following removal of the proceedings, citing as authority Sinclair Refining Company v. Atkinson, 370 U.S. 195.

On May 22nd, 1970, the plaintiffs moved to remand the case to the said Superior Court. Following a hearing in this Court on May 27, 1970, this Court denied the motion for remand, and on June 4, 1970, entered its formal order denying defendants' motion to dissolve the State Court's temporary restraining order. That denial of the motion to dissolve the restraining order was based on the case of Boys Market, Inc., v. Retail Clerks' Union, Local 770, decided by the Supreme Court on June 1, 1970, wherein the Supreme Court expressly overruled its prior decision in the Sinclair case, supra, upon which the defendants had relied.

The order of the Court of June 4, 1970, provides in its pertinent part:

> "The only issue now before the Court is whether or not the District Court is mandated to dissolve the State Court temporary restraining order. The Supreme Court decision in the recent case of Boys Market, Inc., v. Retail Clerks' Union, Local 770, ... U.S. ..... (June 1, 1970), is dispositive of the issue. Accordingly, IT IS ORDERED that the motion to dissolve the State Court temporary restraining order is denied."

The order was dated June 4, 1970.

Defendants' continuing contention that the order of Judge Lercara is no longer in effect is without merit, not only by reason of the order of this Court which denies the motion to dissolve the same, thereby leaving it in continuing full force and effect, but also by reason of the provisions of the Federal removal statute, namely, Section 1450 of Title 28, United States Code, which in its pertinent part provides:

> "All injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the District Court."

The Court further notes that since the entry of that order of June 4th, nothing was done to bring this case at issue and as far as the record discloses, there is no answer on file on the part of the defendants herein.

The Court further notes that the basic objection, and the only objection made a matter of written rec-

ord in the form of a formal motion, was the motion to dissolve on the theory that the Sinclair decision was applicable.

Under all these circumstances, the Court is satisfied that the matter is properly before it on an order to show cause why the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, should not be found in contempt by reason of the alleged activities on the part of the Union, or caused directly by the Union.

This Court, after having heard all of the evidence before it, including the testimony of the witnesses Crall, Dreher and Ranche, and the stipulation with relation to the exchange of correspondence between counsel evidenced by the affidavit of Wesley J. Fastiff, is satisfied that the said defendant, Local No. 70, is in contempt of the order of this Court. It is satisfied that the contempt was deliberate and designed to flount the order of this Court.

One must bear in mind, as the Supreme Court again said in United States v. Mineworkers:

> "The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and wilfully refuses his obedience does so at his peril. In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the wilfully and

deliberate defiance of the Court's order and the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendants' defiance as required by the public interest and the importance of deterring such acts in the future. Because of the nature of such standards, great reliance must be placed upon the discretion of the trial court."

The Court in its discretion having found from the testimony and the affidavits which I have just alluded to—the Court is satisfied that the Defendant Union, or Respondent Union in this case, did in fact comport itself in such manner as to direct and order employees of the plaintiff not to work for any of the companies involved herein, namely, Granny Goose Foods, Sunshine Biscuits, Inc., and Standard Brands, Inc., that the Union did direct and order the picketing of the facilities and situs of equipment of these three named companies, where the effect of the picketing was to induce, encourage or cause employees not to work for plaintiffs; that the Union engaged in activities for the purpose of causing, or with the effect of causing, a work stoppage for or strike against the three companies I just indicated; that the Union has failed to withdraw any orders or directions to employees of these three companies that said employees should engage in a cessation of work for such companies.

Now, having indicated that this was a wilful form of conduct on the part of the defendant, Local 70, it constitutes, as such, an attempt to repudiate and override the instrument of Government in the situ-

ation where Government action may be or is indispensable.

Based upon these findings, the Court concludes and finds that the defendant Local No. 70 is in contempt of an outstanding order of this Court. And it appearing that the violation of the Court's order was in open and flagrant defiance of the order of the Court, it is adjudged that the defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, an unincorporated association, be fined in the sum of $200,000, to be paid into the Treasury of the United States through the Clerk of this Court.

$150,000 of that fine is conditional on the said defendant's failure to purge itself within 24 hours of the date and hour of the signing of the Court's order; $100,000 of said fine is conditioned upon the said defendant's, namely, Local No. 70, failure to purge itself within 48 hours of the date and hour of this order; and $50,000 of said fine is conditioned upon the said defendant's, Local No. 70, failure to purge itself within 72 hours of the date of the signing of the Court's order.

Counsel for the petitioner and plaintiff are directed to secure a transcript of the proceedings, at least a transcript of the order of this Court as orally pronounced, reduce the same to writing and submit it for the Court's signature.

Mr. Silbert, I assume you did the best you could under the circumstances. It is unfortunate that the Court was faced with a situation in which it had to find the defendant Union in contempt of Court. When the Court does so, it wants counsel to understand that despite the action taken by the Court, the Court does not mean in any way to appear to be punishing counsel or to appear to be unhappy with counsel. I recognize that the lawyers in any case and in every case must make the best of whatever situation confronts them at the time.

All right.

Mr. Silbert: Your Honor, we intend to appeal your decision, and I'd request a stay of your order pending appeal.

The Court: Well, I will grant you a stay of the order upon the deposit of a bond of $1,000,000 to cover damages.

Mr. Silbert: Thank you, Your Honor.

December 2, 1970, Wednesday at 5:45 p.m. AJZ
Alfonso J. Zirpoli
Judge of the United States
District Court

Appendix D

Rule 65(b) of the Federal Rules of Civil Procedure provides as follows:

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same

character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Section 527 of the California Code of Civil Procedure provides in pertinent part as follows:

* * *

> No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than *15* [1] *days or, if good cause appears to the court, 20 days* [2] from the date of such order. When the matter first comes up for hearing the party who obtained the temporary restraining order

must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all affidavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desires it, to enable him to meet the application for the preliminary injunction. * * *